

May 11, 2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

WEST RIDGE GROUP, L.L.C.,

Movant.

No. 09-1160
(D.C. No. 1:07-CV-01587-WYD-BNB)
(D. Colo.)

ORDER

Before **KELLY, BRISCOE**, and **HARTZ**, Circuit Judges.

West Ridge Group, L.L.C. seeks a writ of mandamus reversing the district court's (1) decision to strike its jury demand as untimely and (2) grant of summary judgment to defendants on certain claims.

Jury Demand

Mandamus is an appropriate vehicle to seek reinstatement of a jury demand. *See Nissan Motor Corp. in U.S.A. v. Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992) (per curiam); *Hulsey v. West*, 966 F.2d 579, 582 (10th Cir. 1992) (per curiam). But "[t]he petitioner seeking the issuance of a writ of mandamus bears the burden of showing that his or her right to the writ is clear and indisputable." *In re McCarthy*, 368 F.3d 1266, 1268 (10th Cir. 2004) (quotation omitted). "A petitioner seeking mandamus relief must demonstrate a clear abuse

of discretion, or conduct by the district court amounting to a usurpation of judicial authority.” *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995).

The magistrate judge determined that West Ridge’s jury demand was untimely, which resulted in a waiver. *See* Fed. R. Civ. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed.”). He also noted that, prior to filing its jury demand, West Ridge affirmatively waived a jury trial by stipulating to a bench trial in the Scheduling Order. Thus, the magistrate judge declined to order a jury trial under Fed. R. Civ. P. 39(b). *Cf. Nissan Motor Corp.*, 982 F.2d at 409 (holding that there was no abuse of discretion in denying relief under Rule 39(b) where an untimely jury demand was the result of inadvertence). The district court adopted and affirmed the magistrate judge’s order. West Ridge has not shown that it clearly and indisputably has a right to a jury trial in these circumstances. Consequently, it is not entitled to mandamus relief.

Summary Judgment

West Ridge also seeks reversal of the district court’s interlocutory decision to grant summary judgment on several claims. But the writ is not warranted. The decision will be reviewable on direct appeal once the court has entered final judgment, and “[t]he extraordinary relief of a writ of mandamus is not a substitute for an appeal.” *Weston v. Mann (In re Weston)*, 18 F.3d 860, 864 (10th Cir. 1994); *see also Nichols*, 71 F.3d at 350 (noting that, for mandamus, “petitioners must show that they lack adequate alternative means to obtain the relief they

seek” (quotation omitted)). West Ridge’s desire for immediate review does not justify mandamus relief.

Conclusion

West Ridge’s request to withdraw its notice of appeal in No. 09-1146 is DENIED AS MOOT, as No. 09-1146 has already been dismissed. The petition for a writ of mandamus is DENIED.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk